**** THE HON'BLE SRI JUSTICE L. NARASIMHA REDDY***

AND

THE HON'BLE SRI JUSTICE M.S.K. JAISWAL

O.S.A.Nos.50, 56 of 2006 & 8 of 2007

COMMON JUDGMENT:

(Judgment of the Bench delivered by the Hon'ble Sri Justice L. Narasimha Reddy)

%Dt:28-10-2013

Between :

#Sri Edupuganti Subba Rao

..petitioner

And

$M/s Suganti Alloys Castings,
Limited (inliquidation),
Rep. by Official Liquidator,
High Court of A.P., Hyderabad and others

..Respondents

!Counsel for the appellants : Sri V.S. Raju

^Counsel for respondent : Sri M. Anil Kumar

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>HEAD NOTE:

? CASES REFERRED :

THE HON'BLE SRI JUSTICE L. NARASIMHA REDDY

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O.S.A.Nos.50, 56 of 2006 & 8 of 2007

COMMON JUDGMENT:

The subject-matter of these appeals is common, and all of them arise out of similar orders passed in C.A.No.160 of 1995 in C.P.No.68 of 1988. Hence, they are disposed of through a common judgment.

C.P.No.68 of 1988 was filed for liquidation of a Company, by name, M/s Suganti Alloy Castings Limited (for short 'the Company'). All the appellants herein were functioning as Directors of the Company, by the time the company petition was filed. This Court passed an order dated 27-07-1990, directing that the company be wound up; and the Official Liquidator, the sole respondent in these appeals, was directed to take steps, as provided for under the Companies Act, 1956 (for short 'the Act'). There was delay in filing the Statement of Affairs, as required under Section 458 of the Act, by the Board of Directors. The respondent filed C.A.No.142 of 1991 against the Ex. Managing Directors. On the basis of the orders passed therein, a statement of affairs was filed on 03-12-1991. The particulars of assets and liabilities were furnished. Schedules containing the details of the

debtors to the Company were also appended.

The respondent filed the Company Application No.160 of 1995 under Section 543(1), read with Section 458-A of the Act,
for direction to the appellants, to make good, the loss sustained by the Company, on account of their inaction in recovering the debts due to it. It was pleaded that though a list of debtors was furnished along with the statement of affairs, the notices sent by the respondent could not be served in many cases, and in certain other cases, some of the debtors, either have denied the liability or sought for additional information. According to the respondent, the acts and omissions on the part of the appellants resulted in a situation, where the debts due to the company became irrecoverable, and in that view of the matter, they are personally liable, to make good the loss.

The appellants filed replies, opposing the company applications. They pleaded that the filing of C.P.No.68 of 1988 was preceded by various steps, such as filing of C.P.No.35 of 1987, initiation of proceedings under the Sick Industrial Companies Act and consequential reference to Board for Industrial and Financial Reconstruction (BIFR). They pleaded that the records of the company were not at all with them, and ultimately when they submitted the statement of affairs, in compliance with the directions issued by this Court, the respondent did not evince any interest
at all, to recover the amounts due. They pleaded that except that the respondent issued certain proforma notices to some of the debtors, in a casual manner, he did not pursue the matter, at all.
It was also pleaded that once the assets and liabilities in their existing form were handed over to the Official Liquidator,

the appellants cannot be held liable, particularly when it was not even alleged, much less proved, that they have diverted or misappropriated any assets and funds of the company.

A learned single Judge of this Court passed an order dated 19-04-2006, holding that the appellants are jointly and severally liable to make good, the loss, on account of their failure to recover the debts due to the company. The appellants challenge the said order by filing separate appeals.

Sri V.S. Raju, leaned counsel for the appellants submits that the company was subjected to various proceedings under the Act and the Sick Industrial Companies Act, and in that view of the matter, the appellants were disabled from taking any steps to recover loans. He submits that the respondent did not take any steps, at all, to recover the debts, though the list of debtors was furnished. He contends that except making a bald statement in a half-hearted manner, that some of the debts were time barred, no particulars were furnished, and that the observation of the learned single Judge in this behalf is without any basis. Learned counsel submits that it is only when an Ex. Managing Director or Directors of a Company under liquidation are found to have misappropriated the funds or exhibited criminal negligence, in protecting the interests of the Company, that the steps under Section 543 of the Act can be taken. Learned counsel further submits that unverified and unproved plea of the respondent was straightaway accepted by the learned single Judge, and liability was fastened on the appellants.

Sri M. Anil Kumar, learned counsel for the respondent, on the

other hand, submits that, being the Managing Director and Directors of the Company, as the case may be, the appellants were under obligation to ensure that debts due to the company are recovered, or at least steps are initiated for recovery thereof,
and that on account of the negligence exhibited by them,
many debts became time barred. He submits that the learned single Judge conducted a detailed trial and specific findings were recorded on the basis of the oral and documentary evidence.
He submits that the order under appeals does not warrant interference.

The appellants acted as Managing Director and Directors,
as the case may be, of M/s Suganti Alloy Castings Limited, in the 1980's. One of the creditors of the company filed C.P.No.68 of 1988
for winding up, and after following the procedure prescribed under the Act, the Company Court directed winding up of the same, through order dated 16-09-1988. Since the statement of affairs, which is required to be noted under Section 458 of the Act, was not forthcoming from the Board of Directors or the Management of the Company, the respondent filed C.A. No.142 of 1991. This Court passed an order on 11-07-1991, and in compliance with the same,
the statement of affairs was furnished by the Ex. Managing Director on 03-12-1991. The list of assets as well as the creditors to the company was also furnished. A list containing 80 creditors, individuals or institutions was also enclosed. In case an Ex. Director or Joint Director of a Company is found to have resorted to acts of misfeasance, resulting in a hurdle for effective winding up of the company, which is ordered for liquidation, the Company Court is vested with the power to proceed against such Ex. Directors, and even to require them to make good the loss. Before such step is taken,

proper enquiry required, must be undertaken.

The respondent alleged acts of misfeasance against the appellants, and this Court ordered the application. Therefore, it becomes necessary to,

a) understand the scope of expression "misfeasance";

b) find out whether the appellants herein are guilty of the same; and

c) whether the debts, that were due to the Company, were, in fact, barred by limitation.

Points (a) and (b):

To appreciate these two aspects, it becomes necessary to have an idea about Section 543 of the Act. It reads,

> "***Sec. 543: Power of Tribunal to assess damages against delinquent directors, etc.---***
>
> (1) If in the course of winding up of a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company—
>
> (a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or
>
> (b) has been guilty of any misfeasance or breach of trust in relation to the company,
>
> the Tribunal may, on the application of the Official Liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Tribunal thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication,

retainer, misfeasance or breach of trust, as the Tribunal thinks just.

(2) An application under sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust as the case may be, whichever is longer."

The expression "misfeasance" is not defined in the Act. The grammatical meaning thereof is "to do a lawful act in an unlawful manner." In other words, the means adopted by the concerned person, does not justify the end. There does not exist any criminality as such, in matters of this nature. The person or agency accusing another, of malfeasance must demonstrate as to what are the acts performed, what was the prescribed mode of doing them, how the means chosen by the person are wrongful. None of these aspects were pleaded or proved in the instant case.

One thing, which becomes essential, to hold a Director of a Company, who is guilty of 'misfeasance' is that, there must be an allegation and a semblance of proof, that he has intentionally misappropriated or diverted the funds of the company for his selfish needs. The fact that the Director or Managing Director of a Company could have avoided any loss, had he been a bit vigilant; cannot lead to a conclusion that he is guilty of 'misfeasance'.

The very fact that a company has become the subject-matter of litigation discloses that the management thereof was not proper, or that the management faced certain problems, which, it was not able to solve effectively. In case 'misfeasance' is to be interpreted as including the factors like inefficiency, or lack of proper skill,

it comes to be proved, soon after the order of liquidation is passed.

Reverting to the facts of the present case, there was not even an allegation by the respondent that the appellants herein have mis-applied or mis-utilised, or diverted the funds of the company, to advance their personal causes. The only act or rather omission attributed to them was that they were not vigilant enough in taking steps to recover the amounts due to the Company. A vague and bald allegation was made to the effect that some of the debts became time barred.

Even from the oral and documentary evidence, that is adduced by the respondent, it is evident that a list of 80 creditors was furnished along with the statement of affairs, but what all was done by him was that he issued a cyclostyled notice to the creditors.

A typical notice read as under:

"C.P.No.68/88/Suganti/28/94/debt Date -------

//UNDER CERTFIFICATE OF POSTING//

To
Hindusthan Zinc Ltd.,
Gajuwaka,
Visakhapatnam-530 012

Sir/Madam,

Sub: M/s Suganti Alloy castings Ltd., (inlign) – Recovery of debts – Reg.

Ref: 1. This office Letter No.---

2. Your letter No.---------- dt------

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With reference to the above, an amount of Rs.1794-10

was shown as due and payable by you to M/s Suganti Alloy Castings Ltd., (in liquidation) in the Statement of Affairs filed by the ex-Directors of the company in liquidation.

As such, you are hereby directed to pay the due amount of Rs.1794-10 by way of Demand Draft favouring the 'THE OFFICIAL LIQUIDATOR', PAYABLE AT HYDERABAD within three weeks, failing which necessary application will be filed in the Hon'ble High Court of Andhra Pradesh, Hyderabad.

Yours faithfully,
(Sd/-)
OFFICIAL LIQUIDATOR
HIGH COURT OF ANDHRA PRADESH
HYDERABAD

O/c
15/3/94"

The notices were so casual, that neither the debts were mentioned, nor some of the blanks were filled. Few agencies, such as Hindustan Zinc Limited IDCOL Cement Limited, Bharat Heavy Plate and Vessels Limited responded to these notices and wanted further information, so that they can take steps at their level. For example, in their letter dated 19-04-1994, Hindustan Zinc wrote to the respondent as under:

"No.605(2)VZS/PB/94/ Dated 19.4.1994

Official Liquidator
High Court of Andhra Pradesh
3-5-378, First Floor
Kendriya Sadan, Sultan Bazzar
Kothi, Hyderabad – 500 195

Dear Sir,

Sub: Alleged dues payable by us to M/s Suganti Alloy Castings Ltd. (in liquidation).

Ref: Your letter C.P.No.68/88/Suganti/2594/Debt, dtd.17.3.1994.

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On verification of our records it is found that there is no amount payable by us to M/s Suganti Alloy Castings Limited. Our ledgers for the financial year '84-85 had closed with nil balance against the above party and since then we have had to transaction with the party upto now.

However, we are prepared to look into the matter once again if you can furnish full details of the alleged dues of Rs.1,794.10 furnishing therein the relevant Purchase Order No. & date, Party's Bill No. and date, the goods supplied, etc.

Thanking you,

Yours faithfully,
For and on behalf of
HINDUSTAN
ZINC LIMITED
(M.P. SHETTY)
Manager (Finance)"

Similar letters were addressed by certain others, requiring the respondent to furnish further information. In none of them any plea of limitation was raised. The record does not disclose that the respondent has taken any steps to file suits or initiate other proceedings to recover the amounts due. He straightaway filed the application. In the cross-examination, it was elicited from the respondent that he did not issue notices to many debtors.

He stated *inter alia,*

> "M/s. National Engineering Industries Limited, Heavy Engineering Corporation Limited, Awat Singh & Co., KCP Limited, Tata Robins Traser Ltd., Aluminium Industries Ltd., are major sundry debtors. We could not issue any notice to them as the addresses are not clear. Therefore we have addressed Ex.A.69 to first respondent. I do not remember whether he was summoned to office of Official Liquidator for this purpose. Other than Exs.A.67 and A.69 letters, I do not remember we have sent any letters to first respondent. After 1995 we have not addressed any letter to first respondent. In the application it is not specifically mentioned that eighty sundry debts are time barred. We have not filed any suits against sundry debtors."

It was also elicited from the respondent that the records of the company were seized on earlier occasion, and that he did not furnish the details of amounts, that were recovered. The relevant portion reads,

> "When the company was initially wound up in 1988, the Official Liquidator has not seized any records of the company. I do not remember whether Official Liquidator has taken possession of the records of the company after 19.2.1988. Out of an amount of Rs.12,10,032.79 (Rupees twelve lakhs ten thousand thirty two and seventy nine paise only) an amount of Rs.3,759.08 (Rupees three thousand seven hundred and fifty nine and eight paise only) is recovered. The details of the amount realized are not mentioned in the application".

No other witness was examined on behalf of the respondent. Therefore, we hold that the respondent failed to prove the acts of misfeasance against the appellant.

Point (c):

The learned single Judge proceeded to give a finding on the aspect of limitation. The relevant portion reads:

> "In view of the above decisions and in view of the fact that the Official Liquidator, in fact, was appointed to take charge of the company under liquidation only in pursuance of the order passed in C.P.No.68 of 1988, dated 27.7.1990, the period of limitation has to be computed only from that date and if five years period is computed from that date, the application filed is within the period of five years, since the application was filed on 26.07.1995, even without the assistance or aid of the provisions of S.458A of the Act. In the light of the above, the contention of the learned counsel for the respondents is clearly devoid of merit, and therefore, this issue is accordingly held in favour of the Official Liquidator and against the respondents."

It is essential to take note of Section 458-A of the Act. The provision directs that the limitation in respect of any debt to a company would stop running from the date of commencement of the winding up of the company. It reads,

> **Sec.458-A**. Exclusion of certain time in computing periods of limitation.--- Notwithstanding anything in the Indian Limitation Act, 1908, (9 of 1908) or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by the Tribunal, the period from the date of commencement of the winding up of the company to the date on which the winding up order is made (both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded."

With great respect to the learned single Judge, we are compelled to observe that 'the finding on the question of limitation was totally uncalled for. It is only when the respondent initiated

proceedings before a proper forum for recovery of amount; the debtor took the plea of limitation, and the claim stood defeated on account of that plea; that, there would have been an occasion to examine the liability of the appellants with reference to the said plea. When the respondent did not even choose to issue notices to many creditors and did not care to furnish some information to the other creditors, when sought for, there was no basis to declare such debts as time barred. It is only when a debt was found to have barred by time, the order of winding up was passed, that any scope of alleging negligence on the part of the erstwhile management of the company would have existed. The time stands frozen, once an order of winding up is passed.

Hence, we allow the appeals and set aside the order dated 19-04-2006 passed in C.A.No.160 of 1995 in C.P.No.68 of 1988.
The negligence, if at all, was on the part of the then Official Liquidator.

There shall be no order as to costs.

L. NARASIMHA REDDY, J.

M.S.K. JAISWAL, J.

Dt.28-10-2011.

Note:
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